No. 12815

# In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

STATE CENTER WAREHOUSE AND COLD STORAGE COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on August 24, 1950 (90 N. L. R. B. No. 300; R. 69–71), pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Sec. 151, *et seq.*), herein called the Act.[1] The jurisdiction of the Court is based upon Section 10 (e) of the Act, the unfair labor practices having

[1] Relevant portions of the Act referred to herein appear in the appendix, *infra*, pp. 21–23.

occurred in Fresno, California, within this judicial circuit.[2]

## STATEMENT OF THE CASE

Acting upon charges of unfair labor practices filed by the International Brotherhood of Teamsters, Local No. 431, herein referred to as the Union, the Board issued its complaint which alleged that respondent threatened to close its plant if its employees joined the Union, interrogated its employees regarding their union activities, threatened to discharge them for union membership, and discharged Moses Machoian because of his membership and activity in the Union, in violation of Sections 8 (a) (1) and (3) of the Act (R. 3–7).

Following the customary proceedings, the Board issued its decision finding that respondent had violated Sections 8 (a) (1) and (3) as charged. It ordered respondent to cease and desist from the unfair labor practices found, to post appropriate notices, and to make Machoian whole for any loss suffered as a result of his discriminatory discharge (R. 64–71).

### I. The Board's findings of fact and conclusions of law

#### A. Respondent interrogated and threatened its employees with respect to their union membership in violation of Section 8 (a) (1)

Respondent first heard of its employees' interest in self-organization late in January 1949, when its labor relations consultant, Bob Johnson, informed it

[2] Respondent is a California corporation engaged in receiving, storing, and shipping agricultural products, groceries, furniture and other merchandise. The value of the merchandise stored exceeds $100,000, over 60 percent of which was shipped from points outside the State. In addition, respondent acts as local distrib-

that the Union was attempting to organize its employees (R. 19; 133).[3] This report was confirmed on February 10, 1949, when the Board notified respondent by mail that the Union had filed a petition for certification as the bargaining representative of respondent's employees (R. 17; 75).

Respondent wasted no time in impressing its employees with its deep hostility to the Union. Shortly after respondent's receipt of the Board's letter, Louise Mosesian[4] entered a boxcar which was being unloaded by all five of respondent's employees.[5] She asked the assembled group "if any of [them] had spoken to anybody," apparently referring to the union representative. Replying in unison, they said they had not. Louise then interrogated each of them individually as to his union membership. Each, in turn, denied having joined the Union. Rebuffed by their insistent denials, Louise Mosesian threatened to ferret out the desired information, stating, "I know who has already signed, but you don't have to tell me. I am going to

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utor for such nationally advertised products as Clabber Girl Baking Powder, Wesson Oil, and Wyandotte Cleanser. Respondent concedes that it is engaged in interstate commerce and is within the jurisdiction of the Board, as the Board found (R. 15, 75).

[3] References preceding the semicolon are to the Board's findings. Those following the semicolon are to the supporting evidence.

[4] Louise Mosesian, the daughter of respondent's president, is one of the principal stockholders and an officer of the State Center Warehouse and Cold Storage Company (R. 13; 161). She, together with two other officers, was charged with the active management of the enterprise, including disciplinary control of the workmen (R. 15; 161–162).

[5] These were employees Eccles, Ejadian, Ekzoozian, Krikorian, and Machoian.

find out anyway." Then, having already revealed respondent's hostility toward the Union by the tenor of her interrogation, Louise Mosesian gave point to her previous remarks by reminding the men that "Mama [6] could always shut [the warehouse] or rent it out." (R. 19–20, 25; 77–80, 252–254, 259.)

Louise Mosesian continued her efforts to ascertain each employee's feelings with regard to union membership. Shortly before the election, which the Board had scheduled as part of the representation proceeding initiated by the union, she stopped Krikorian in the warehouse and stated, "I know you will vote against the Union but how about Eddie [Ejadian]?" He replied, "Eddie would vote the same as I would" (R. 23; 261).

Mrs. Twodi Mosesian likewise resorted to threats in her effort to defeat the Union. Sometime before the impending election, Mrs. Mosesian directed her housekeeper, Agnes Azidigian, to tell employee Eddie Ejadian [7] that "If Eddie belonged to Union, [I] don't keep him." Mrs. Azidigian delivered this message as instructed (R. 23; 155, 158, 180–181, 184).

The Board concluded that respondent, by the conduct of Louise Mosesian in interrogating its employees and threatening to close the warehouse if they joined the Union, and by the conduct of Twodi Mosesian in threatening to discharge Ejadian if he joined the Union, interfered with, restrained, and coerced

[6] Mrs. Twodi Mosesian, the president of the State Center Warehouse and Cold Storage Company, is the mother of Louise.

[7] Mrs. Azidigian was Ejadian's mother-in-law.

its employees in violation of Section 8 (a) (1) of the Act (R. 66).

**B. The discharge of Machoian in violation of Section 8 (a) (3) and (1)**

Moses Machoian had been employed by respondent as a warehouse laborer for six months at the time of his discharge. During that period his work had not been criticized. On the contrary, he had been referred to by Louise Mosesian as a "good worker" (R. 261).

Prior to his employment by respondent, Machoian had worked for one Michael Sohigian, a close friend of the Mosesians. While there, he had been the leader of the campaign to organize Sohigian's plant (R. 21; 81, 139). One evening when both Sohigian and employee Ekzoozian were visiting the Mosesians,[8] the conversation turned to the union activities in respondent's warehouse. In response to an inquiry, Sohigian stated that he had discharged Machoian for organizing the union at his plant. The Mosesians and Sohigian agreed that Machoian was also "the one who organized [respondent's warehouse]"; they were "sure [he was] the one" (R. 21; 81, 113, 255).[9]

[8] The Trial Examiner found a "close personal and social relationship between Michael Sohigian and the Mosesians and [a] less close, but nevertheless, social relationship existing between Ekzoozian and the Mosesians. It was therefore not unusual for them to meet on social occasions (R. 18–19).

[9] The conversation at the Mosesians was related to Machoian by Ekzoozian the next day during the course of a quarrel which terminated with Ekzoozian's threat to get Machoian fired because of his union activity and his departure for respondent's office in an apparent effort to carry out his threat (R. 22; 81–84). Although Machoian testified that the conversation of the previous evening with Sohigian was reported to him by Louise Mosesian (R. 21; 81), Louise denied having spoken to Machoian about it,

On April 12, 1949, at closing time, Machoian went to the office to pick up his pay check. As he walked out Twodi Mosesian informed him that he had been discharged. When Machoian inquired as to the reason for her action, she refused to give one, replying contemptuously, "That's my business" (R. 25; 87).[10]

In its answer to the Board's complaint Respondent assigned smoking contrary to warehouse rules as the chief and immediate cause of discharge (R. 9). Thereafter, at the hearing before the Trial Examiner, respondent also urged that Machoian was discharged for singing, dancing, and loud talking while at work (R. 32; 116–117). In addition respondent adduced testimony that Machoian suffered some incapacity from an injured finger, although it formally disclaimed that this was an added reason for the discharge (R. 33). The Board, upon considering the several explanations advanced by respondent, found that Machoian was in fact discharged for none of these reasons, but because of his union activity (R. 33–36, 66–67).

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and her denial was corroborated by Ekzoozian and Krikorian (R. 21; 172). However, Krikorian, the only wholly disinterested party testifying to this incident, further testified that Ekzoozian made a statement to Machoian similar to that which Machoian attributed to Louise (R. 21–22; 255). From this evidence the Trial Examiner and the Board concluded that the conversation was in fact reported by Ekzoozian (R. 22).

[10] According to Mrs. Mosesian's testimony she told Machoian that he was discharged for smoking. The Trial Examiner and the Board disbelieved this testimony and credited Machoian, for the reasons stated by the Trial Examiner (R. 29–30). Aside from the fact that the issue of credibility was for the Board to resolve, (see *infra*, p. 10, n. 13), the "smoking" excuse, if made, was a pure pretext, as the Board found, *infra*, pp. 7–8.

The "no smoking" rule, upon which respondent primarily relied, "was observed very much in the breach thereof."[10a] Justice, the general operating manager who himself often smoked in the warehouse, was never informed by respondent that it had any rule against smoking, notwithstanding the fact that Louise Mosesian knew he customarily smoked either a pipe or cigar while at work (R. 26–29, 67; 186–187, 264–266). In fact, testimony adduced by respondent established not only that all of the warehousemen, but even Mrs. Mosesian, herself, smoked in the warehouse. Every employee witness [11] agreed that smoking was a common practice. (R. 31; 88–89, 125–130, 189, 225–226, 256–257).

Machoian, like his fellow employees, smoked in the warehouse. Yet no one complained to him about his smoking, or warned him that it was contrary to the rules, or that it might result in his discharge (R. 26, 31, 67; 37). When Mrs. Mosesian observed him smoking she did not even see fit to reprimand him (R. 128). Although Louise Mosesian expressed annoyance at Machoian's smoking, her irritation was not caused by any supposed infraction of a much broken rule, but was solely occasioned by a personal distaste for smoking (R. 175). In fact, at a time when Louise, by her own testimony, knew that Machoian smoked, she stated, in answer to an inquiry by Krikorian as

[10a] From Judge (now Mr. Justice) Minton's opinion in *R. R. Donnelly & Sons Co.* v. *N. L. R. B.*, 156 F. 2d 416, 421 (C. A. 7), certiorari denied, 329 U. S. 810, in which alleged violation of a "no smoking" rule was likewise urged as a grounds for discharge.

[11] All of respondent's warehousemen with the exception of one, Eccles, testified in this case.

to whether she intended to fire Machoian, "No. He is a good worker" (R. 261). The Board, in the light of this evidence, found respondent's defense that it discharged Machoian for violating its "no smoking" rule "most unpersuasive" (R. 67).

As noted above, respondent also urged, albeit belatedly, that Machoian was discharged for singing, dancing, and loud talking. Although it is true that Machoian on occasion did wax exuberant while at work, he was never disciplined or threatened with discharge for such conduct (R. 32–33; 130–132). Another employee, Krikorian, testified that he too sang loudly in the warehouse, and was merely irritably told by Louise Mosesian, "If you want to sing, go home and sing." (R. 258–259). The latest occasion on which Machoian's exuberance annoyed Louise occurred several months before his discharge (R. 32; 167–169). Moreover, although Louise was apparently the one chiefly annoyed by the noise in the warehouse, she, according to her own testimony, had nothing to do with Machoian's discharge (R. 32–33; 197–199), and her mother, who actually effected the discharge, claimed to have based it on the "smoking" violations (R. 33; 271). The Board therefore rejected respondent's attempt to attribute the discharge to Machoian's exuberance in the warehouse.

The Board found that the true motivation for Machoian's discharge lay in his union activities (R. 67). In support of its findings the Board relied on respondent's open hostility to the Union as evidenced by the Mosesians' threats to close the ware-

house and to discharge a union adherent, on respondent's belief that Machoian was responsible for bringing the Union into the warehouse, on respondent's refusal to give Machoian any reason for his discharge at the time it was effected, and on the shifting and transparently insubstantial reasons thereafter advanced to explain his dismissal (R. 66–67). Accordingly, the Board concluded that by discharging Machoian for his union activities, respondent violated Sections 8 (a) (1) and (3) of the Act (R. 66).

### II. The Board's order

The Board ordered respondent to cease and desist from discouraging membership in any union by discriminating in any manner against any of the employees with regard to their hire and tenure of employment; from interrogating its employees concerning their union activites; threatening to ascertain which of its employees are union members; threatening to close the warehouse because of union activities; threatening replacement of employees who join the union; and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by the Act.

Affirmatively, the Board ordered respondent to make Machoian whole for any loss of pay suffered by the discriminatory discharge;[12] upon request, to

[12] Back pay was ordered from the date of the discharge to January 24, 1950, the date when Machoian decided not to return to his former employment (R. 67). Back pay is to be computed in accordance with the "quarterly" formula now customarily prescribed by the Board. *F. W. Woolworth Co.*, 90 N. L. R. B. No. 41 (R. 68).

make available to the Board all records necessary to compute the amount of back pay due; to post appropriate notices of compliance; and to notify the Board within ten days from the date of the order what steps it has taken to comply.

## QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (1) of the Act by threatening to close the warehouse and discharge employees if they voted for the Union and by interrogating them with regard to their union activities?

2. Whether substantial evidence supports the Board's finding that respondent violated Section 8 (a) (3) and (1) by discharging Machoian because of his union activity?

## ARGUMENT

### I

### Substantial evidence supports the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act

The evidence recited above (pp. 3–4) establishes that respondent interrogated its employees as to their union activity, threatened to close its warehouse if the Union won the representation election, and threatened to discharge an employee if he joined the Union.[13]

[13] Respondent's denials that these episodes occurred raised a conflict in the evidence which both the Trial Examiner and the Board resolved adversely to respondent. The Trial Examiner in a detailed report noted that "the resolution of questions of credibility [was] especially difficult" in this case (R. 18) and explained the basis upon which he resolved the issues (R. 18–19). Under these circumstances this Court will not "displace the Board's choice between two fairly conflicting views." *Universal Camera Corp.*

Such conduct has consistently been held by the courts to constitute interference, restraint, and coercion of employees in violation of Section 8 (a) (1) of the Act.

Louise Mosesian's direct interrogation of each of the employees as to his union membership and her later attempt to ascertain how some of them would vote in the election (*supra,* pp. 3–4) is conduct uniformly condemned by this and other courts as violative of Section 8 (a) (1). See, e. g., *H. J. Heinz Company* v. *N. L. R. B.,* 311 U. S. 514, 518; *N. L. R. B.* v. *Bradford Dyeing Association,* 310 U. S. 318, 327; *N. L. R. B.* v. *Holtville Ice and Cold Storage Co.,* 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B.* v. *J. G. Boswell Co.,* 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B.* v. *Wm. Davies Co.,* 135 F. 2d 179, 181 (C. A. 7), certiorari denied, 320 U. S. 770; *N. L. R. B.* v. *Dixie Shirt Co.,* 176 F. 2d 969, 971, 973 (C. A. 4); *N. L. R. B.* v. *Norfolk Southern Bus Corp.,* 159 F. 2d 516, 518 (C. A. 4), certiorari denied, 330 U. S. 844.[14]

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v. *N. L. R. B.*, 71 S. Ct. 456, 465; see also, *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 597; *N. L. R. B.* v. *Lettie Lee*, 140 F. 2d 243, 247 (C. A. 9). The amendments to the Act make no change in the standard of review applicable in this Court which "has always applied the attitude reflected in this legislation" (*Universal Camera*, 71 S. Ct. at 466). See *N. L. R. B.* v. *Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 834; *Willapoint Oyster Co.* v. *Ewing*, 174 F. 2d 676, 685–686, certiorari denied, 338 U. S. 860; cf. *N. L. R. B.* v. *Tri-State Casualty Co.*, 27 L. R. R. M. 2505, 2507 (C. A. 10, March 21, 1951).

[14] The Board has stated its position as follows: "Interrogation by an employer * * * invades the employee's privacy and thus constitutes interference with his enjoyment of the rights guaranteed to him by the Act. * * * The employee who is

Similarly, Louise Mosesian's thinly veiled threat, following her attempt to conduct an inquisition into the employees' union affiliation, that "Mama could always shut [the warehouse] or rent it out," and Mrs. Mosesian's direct threat to fire Ejadian if he joined the Union (*supra,* pp. 3–4) are plainly calculated to coerce or restrain the employees in the exercise of their rights under Section 7. Threats of such a nature have been repeatedly held to violate Section 8 (a) (1). See e. g., *N. L. R. B.* v. *Fruehauf Trailer Co.,* 301 U. S. 49, 55; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 270; *N. L. R. B.* v. *Reeves Rubber Co.,* 153 F. 2d 340, 341, (C. A. 9); *N. L. R. B.* v. *Holtville Ice and Cold Storage Co.,* 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B.* v. *Idaho Refining Co.,* 143 F. 2d 246, 248 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.,* 140 F. 2d 243, 249 (C. A. 9); *N. L. R. B.* v. *Long Lake Lumber Co.,* 138 F. 2d 363, 364 (C. A. 9); *N. L. R. B.* v. *J. G. Boswell Co.,*

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interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union activities, but also contemplates some form of reprisal once this information is obtained. * * * He feels a refusal to answer or a truthful answer may cost him his job. * * * Weighing these 'subtle imponderables', the Board early characterized direct interrogation as 'a particularly flagrant form of intimidation of individual employees'. * * * Interrogation cannot be considered an expression of 'views, arguments, or opinions' within [Section 8 (c)]. Moreover, the purpose of that section is to permit an employee to express his views, not to license him to extract those of his employees. The employer is explicitly accorded a right to 'influence' his employees by verbal appeals to reason, but not to fear." *Standard-Coosa-Thatcher,* 85 N. L. R. B. 1358, cited with approval in *Joy Silk Mills Inc.* v. *N. L. R. B.,* 185 F. 2d, 732, 743 (C. A. D. C.).

136 F. 2d 585, 590 (C. A. 9); *N. L. R. B.* v. *Polson Logging Co.*, 136 F. 2d 314 (C. A. 9).[15]

## II

**Substantial evidence supports the Board's finding that respondent discriminatorily discharged Machoian in violation of Sections 8 (a) (3) and (1) of the Act**

The facts surrounding the discharge of Machoian are clearly sufficient to support the Board's finding that he was discriminatorily discharged. Briefly summarized, the evidence establishes that respondent has a strong anti-union animus; it believed Machoian was the mainspring behind the union activity in its

[15] Contrary to Respondent's contention before the Board, the interrogation and threats found violative of Section 8 (a) (1) were not protected utterances under Section 8 (c) which permits expression of any "views, argument or opinion * * * if such expression contains no threat of reprisal or force or promise of benefit." The threats to close the warehouse and to discharge an employee for union membership are thus clearly outside the area of discussion permitted by Section 8 (c). Interrogation, not being an expression of "views, argument or opinion," has been recognized as a form of interference and intimidation. See n. 14, p. 11, *supra;* see also *N. L. R. B.* v. *Kropp Forge Co.*, 178 F. 2d 822 (C. A. 7), certiorari denied, 340 U. S. 810; *N. L. R. B.* v. *La Salle Steel Co.*, 178 F. 2d 829, 832 (C. A. 7), certiorari denied, 339 U. S. 963; *N. L. R. B.* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5).

Respondent's attempted reliance on *Sax* v. *N. L. R. B.*, 171 F. 2d 769 (C. A. 7) is similarly misplaced. Respondent's persistent interrogation and its threats of discrimination culminating in the actual discriminatory discharge of Machoian can scarcely be characterized as mere "prefunctory, innocuous remarks and queries * * * standing naked and alone." (*Sax* case, *supra* at pp. 772–773). The court which decided the *Sax* case has twice recently taken pains to limit that case to its own extremely narrow ground. See *N. L. R. B.* v. *La Salle Steel Co.*, *supra* at p. 835; *N. L. R. B.* v. *Kropp Forge Co.*, *supra* at p. 828.

warehouse; Machoian, whom respondent regarded as "a good worker," was discharged without previous warning and without explanation; and thereafter respondent belatedly offered several implausible explanations for the discharge (*supra,* pp. 5–9).

Each of the elements relied upon by the Board has been recognized by the courts as evidence from which the Board might reasonably draw an inference of discriminatory treatment. When an employer, whose hostility to a union has already led him to threaten a union adherent with discharge because of his membership, and to commit other violations of the Act, discharges an employee whom he believes to be responsible for organizing his plant, it is a justifiable inference that the discharge was related to the employee's union activity. *N. L. R. B.* v. *Mackay Radio and Telegraph Co.,* 304 U. S. 333, 347; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 588; *N. L. R. B.* v. *Morris P. Kirk & Sons, Inc.,* 151 F. 2d 490, 492–493 (C. A. 9). That inference is inescapable where it also appears that the discharge was precipitate without prior reprimand, warning, or discipline, but on the contrary the employee had been characterized as "a good worker." "Such [precipitate] action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had had no other circumstance in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for cor-

rection of the objectionable practice, would be almost inevitable. The summariness of the discharges of these employees, admittedly theretofore satisfactory, gives rise to a doubt as to the good faith of the assigned reasons." *E. Anthony & Sons* v. *N. L. R. B.*, 163 F. 2d 22, 26–27 (C. A. D. C.), certiorari denied, 332 U. S. 773. See also *N. L. R. B.* v. *Bradford Dyeing Assoc.*, 310 U. S. 318, 327, 329; *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. 2d 488, 493 (C. A. 9), certiorari denied, 306 U. S. 643. And, finally, the refusal to give the employee any reason for his discharge furnishes additional ground for finding that the motive was discriminatory. *N. L. R. B.* v. *Wells, Inc.*, 162 F. 2d 457, 459 (C. A. 9), *N. L. R. B.* v. *American Potash and Chemical Corp.*, *supra* at p. 493.[16]

Respondent in its answer to the complaint alleged violation of the "no smoking" rule as the basis for the discharge. Here, as in *N. L. R. B.* v. *Bird Machine Co.*, 161 F. 2d 589, 592 (C. A. 1), "the weight to be accorded the inferences drawn by the Board is augmented by the fact that the explanation of the dis-

[16] As the Fourth Circuit stated in the oft-cited *Hartsell Mills* case: "It must be remembered * * * that the question [of motive] involved is a pure question of fact; that, in passing upon it the Board may give consideration to circumstantial evidence as well as to that which is direct; that direct evidence of a purpose to violate the statute is rarely obtainable; and that where the finding of the Board is supported by circumstances from which the conclusion of discriminatory discharge may legitimately be drawn, it is binding upon the courts as they are without power to find facts or to substitute their judgment for that of the Board." *Hartsell Mills Co.* v. *N. L. R. B.*, 111 F. 2d 291, 293 (C. A. 4).

charge offered by respondent did not stand up under scrutiny."

The evidence that not only the manager and all the employees, but even Mrs. Mosesian, herself, smoked in the warehouse, *supra,* p. 7, establishes that the "no smoking" rule was not enforced. The warehouse manager did not even know of its existence, and although all of the employees customarily violated the rule only one of them, not the dischargee, was ever reprimanded therefor. Upon these facts, the Board had clear warrant for rejecting respondent's contention that Machoian was discharged for smoking (R. 67). Moreover, even assuming, *arguendo,* that respondent suddenly invoked the "no smoking" rule, its use to discharge, without warning, the man believed to be the union leader evidences both an unwarranted severity and a disparity of treatment which the courts have frequently recognized as constituting cogent evidence of discrimination. *N. L. R. B.* v. *Idaho Refining Co.,* 143 F. 2d 246, 248 (C. A. 9) *N. L. R. B.* v. *Ford Brothers,* 170 F. 2d 735, 738 (C. A. 6).

Respondent's belated attempt to attribute Machoian's discharge to his singing and dancing while at work is, if anything, less persuasive than its attempt to rely on the "no smoking" rule. Indeed, the very manner in which the defense is asserted further supports the Board's finding of discrimination. Inconsistency in explaining the reason for a discharge has long been regarded as a legitimate factor on which to base an inference that the true reason for the discharge is being concealed. *N. L. R. B.* v. *Waterman Steam-*

*ship Co.,* 309 U. S. 206, 221, 223; *N. L. R. B.* v. *Yale and Towne Manufacturing Co.,* 114 F. 2d 376, 378 (C. A. 2). In any event, the record is devoid of evidence that Machoian's singing was in any way related to his discharge, let alone that it was "the moving cause" thereof (*Wells Inc.,* v. *N. L. R. B.,* 162 F. 2d 457, 460 (C. A. 9). But even assuming that such evidence existed, respondent's discharge of one it believed to be the union leader for so trivial an offense, without prior warning, would only serve to demonstrate further that disparity of treatment which, as noted above, evidences illegal discrimination.

As in *N. L. R. B.* v. *Robbins Tire and Rubber Co.,* 161 F. 2d 798 at 801 (C. A. 5):

> Here there is evidence that the employer was biased against unionization, and the ground of the discharges seems not greatly serious * * * Here, too, the discharged persons are union members who have been active in, or sympathetic toward union affairs * * * [S]ince the cause assigned was not one for which discharges were ordinarily made, or even threatened, the employer's antipathy to union membership, interest, or activity had tipped the balance in the scales of causation and had become the *causa causans,* the real cause of the discharge.

## III

### The Board's order was valid and proper

Respondent in its answer filed in this Court alleges that "the Board failed as required by Section 8 (b) of the Administrative Procedure Act (60 Stat.

237, 5 U. S. C. 1001, *et seq.*) to make a ruling or finding on each exception made by the Company to the Trial Examiner's intermediate report" (R. 288). We submit that the objection is not well taken.

Section 8 (b) of that Act provides, *inter alia*—

> The record shall show the ruling upon each finding, conclusion, or exception presented. All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor upon all the material issues of fact, law, or discretion presented on the record. * * *

The nature of the requirements of this section was fully stated in the reports of the congressional committees at the time it was enacted:

> The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case, and the novelty or complexity of the issue may require.
>
> Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa. (Senate Report 752, 79th Cong. 1st Sess., p. 24; House Report 1980, 79th Cong., 1st Sess., p. 39.)

The Board's decision and order, which except for certain specified particulars adopted the findings and conclusions of the Trial Examiner, fully apprised respondent of the Board's ruling upon the exceptions. As the committee report quoted above establishes, respondent errs in suggesting that the Board was required to state separately its findings of fact or conclusions of law upon each exception filed.

Respondent also urges in its answer that the cease and desist provisions of the Board's order should not be enforced because there is no evidence that respondent has continued to violate the Act (R. 291). Settled authority establishes the Board's right to a judicial decree enforcing its order, even if the respondent has complied therewith. As the Supreme Court recently stated (*N. L. R. B.* v. *Mexia Textile Mills,* 339 U. S. 563, 567–568):

> We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. * * * A Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair practices barred by an enforcement decree * * * the Act does not require the Board to play hide and seek with those guilty of unfair labor practices.

## CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid

and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.

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APRIL 1951.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. Sec. 141 *et seq.*) are as follows:

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

"SEC. 8. (c) The expressing of any views, argument, or opinion, of the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall

be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

"SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because

of extraordinary circumstances. The findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *"

The relevant provision of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.,* is as follows:

"SEC. 8. (b) SUBMITTALS AND DECISIONS.

"* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

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